No. 43247-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bruce Stewart,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00447-1

The Honorable Judge Anna M. Laurie

Appellant's Opening Brief

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for second-degree assault requires proof that the accused person intentionally assaulted another and thereby recklessly caused substantial bodily harm. Here, the court's instruction defining recklessness allowed the jury to convict if they found Mr. Stewart intentionally assaulted Yanac. Did the trial court's instructions include an improper mandatory presumption that misstated the law and relieved the state of its burden to prove all the essential elements of the crime charged, in violation of Mr. Stewart's Fourteenth Amendment right to due process?

2. The corpus delicti rule requires independent evidence of each element of a charged crime before the factfinder may consider the accused person's statements. Here, the prosecution failed to present independent evidence that Mr. Stewart intentionally assaulted Yanac, that the assault caused the harm suffered by Yanac, or that Mr. Stewart was reckless in inflicting substantial bodily harm. Did Mr. Stewart's conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

3. A prosecutor may not introduce evidence of an accused person's pre-arrest silence during its case-in-chief, or highlight the accused person's silence in closing. Here, the prosecutor introduced evidence that Mr. Stewart had not returned telephone calls from the investigating officer, and highlighted

that fact in closing. Did the prosecutor unfairly comment on Mr. Stewart's privilege against self-incrimination, in violation of the Fifth and Fourteenth Amendments?

4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel unreasonably failed (a) to raise a corpus delicti objection, (b) to object to inadmissible and prejudicial hearsay, and (c) to object when the prosecutor unfairly commented on Mr. Stewart's right to remain silent. Was Mr. Stewart denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Richard Yanac regularly went to a bar where Bruce Stewart was the bartender, and he sold soap and clay carvings there. RP[1] 54-57. The two were friends. RP 70. Mr. Yanac also suffered seizures, one of which had occurred in the bar when he fell and lost consciousness. RP 75-77.

One day in June of 2010, he went to visit his friend Judy Orr, who lived near the bar. RP 59. He remembered that he drove his truck there, saw Mr. Stewart, and that he saw his phone on the ground in pieces. From there he remembered nothing, until he was being treated by paramedics and having convulsions. RP 59-61, 68-69, 79, 81-82. He was in the hospital for three weeks, and then released to a nursing home for a year of recovery. RP 61-64.

Yanac doesn't know how he was hurt that day, whether it was a seizure or something else. RP 66, 78, 80. However it happened, his vision, balance and daily activities were impacted. RP 57-58, 64-65.

When he found out that his medical bills would only be covered if he made a police report, he called police to report the incident, claiming Mr. Stewart assaulted him. RP 69. Later, he hired an attorney to sue Mr.

[1] The trial transcript is sequentially numbered and will be referred to as RP. There are no citations to other hearings in this brief.

Stewart, but decided against following through since he didn't know how he was hurt. RP 79-80, 84.

Police decided to talk to Mr. Stewart about the incident, and attempted to contact him in February of 2011. RP 85-89. Mr. Stewart confirmed that he had punched Yanac that day. RP 95.

The state charged Mr. Stewart with Assault in the Second Degree, alleging that he "did intentionally assault another... and thereby recklessly inflicted substantial bodily harm..." CP 1.

At trial, the state did not offer the testimony of any eyewitnesses to the incident, nor did they offer any medical testimony regarding the alleged injuries that Mr. Yanac suffered from the assault. RP 54-108.

Without defense objection, Detective Keeler testified that when he arrested Mr. Stewart, Keeler "let [Mr. Stewart] know that I had previously tried to contact him – he hadn't returned my calls – ..." RP 90. He then read Mr. Stewart his rights and took his statement. Mr. Stewart eventually admitted that he had assaulted Yanac, and said that he did not mean to hurt him as badly as he was apparently hurt. RP 95-96.

The court gave an outdated standard jury instruction defining recklessness, which included the following: "Recklessness also is established if a person acts intentionally or knowingly." No. 9, Court's Instructions, Supp. CP.

During its rebuttal closing argument, the state referred to Mr. Stewart's statement to the police:

> Defense counsel made a point of describing how Mr. Stewart made his confession down the road, months had gone by. Well, it's true. Mr. Stewart didn't tell the police how he was involved with the injuries to Mr. Yanac until many months had gone by. Mr. Stewart's choice.
> RP 155.

The jury convicted Mr. Stewart of the charge. CP 9. After sentencing, Mr. Stewart timely appealed. CP 22-33.

ARGUMENT

I. MR. STEWART'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS INCLUDED A MANDATORY PRESUMPTION.

A. Standard of Review

Constitutional violations are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A manifest error affecting a constitutional right may be raised for the first time on review.[2] RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to

[2] The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. State v. Nguyen, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Toth, 152 Wash. App. 610, 614-15, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Jury instructions are reviewed de novo. State v. Hayward, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

B. Due process prohibits the use of mandatory presumptions in criminal cases.

Under the Fourteenth Amendment's due process clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. State v. Thomas, 150 Wash.2d 821, 844, 83 P.3d 970 (2004).

Due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. State v. Savage, 94 Wash.2d 569, 573, 618 P.2d 82 (1980) (citing Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). Seattle v. Gellein, 112 Wash.2d 58, 63, 768 P.2d 470 (1989). An instruction creates a conclusive presumption whenever "a reasonable juror might interpret the presumption as mandatory." State v. Deal, 128 Wash.2d 693, 701, 911 P.2d 996 (1996).

The Washington Supreme Court has "unequivocally rejected the [use of] any conclusive presumption to find an element of a crime," because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. State v. Mertens, 148 Wash.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. Id., at 834.

C. The trial court's instructions in this case included a mandatory presumption which misstated the law and relieved the prosecution of its burden to prove that Mr. Stewart recklessly inflicted substantial bodily harm.

RCW 9A.08.010 ("General requirements of culpability") defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus "[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly." RCW 9A.08.010(2).

Second-degree assault (as charged in this case) requires proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. CP 1-2; RCW 9A.36.021. Applying the substitution provisions of RCW 9A.08.010, a person may be convicted of second-degree assault if she or he "[i]ntentionally assaults another and thereby

[intentionally, knowingly, or recklessly] inflicts substantial bodily harm." RCW 9A.36.021, modified.

Here, the trial court's instruction defining recklessness included the following language: "Recklessness also is established if a person acts intentionally or knowingly."[3] Instruction No. 9, Supp. CP. The instruction—based on former WPIC 10.03 (2009)--did not place any limitation on the intentional acts that could establish the recklessness required by RCW 9A.36.021.[4]

Under these circumstances, "a reasonable juror might interpret" the instruction to require a finding of recklessness upon proof of an intentional assault. Deal, at 701. Although lawyers and judges, being familiar with RCW 9A.08.010, would understand that the instruction was not to be applied in this way, jurors lack the tools that help lawyers and judges interpret ambiguous language. See, e.g., State v. Harris, 122 Wash.App. 547, 553-554, 90 P.3d 1133 (2004) ("[T]he standard for clarity in jury

[3] In keeping with RCW 9A.08.010, this language was (presumably) intended to convey to jurors that they could convict Mr. Stewart if he intentionally inflicted substantial bodily harm.

[4] In 2010, WPIC 10.03 was amended to correct this problem. The pattern instruction now includes the following language: "When recklessness as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact. WPIC 10.03 (certain bracketed material omitted). Presumably, the use of the outdated version of WPIC 10.03 in this case was an oversight.

instructions is higher than that for a statute because although courts may use statutory construction, juries lack these same interpretive tools.")

Nearly identical language has previously been found to require reversal under the same circumstances. Hayward, supra. In Hayward, as in this case, the defendant was accused of intentionally assaulting another and thereby recklessly inflicting substantial bodily harm. Id, at 640. The trial court instructed the jury that "Recklessness also is established if a person acts intentionally." Id. The Court of Appeals reversed the conviction, holding that the instruction created a mandatory presumption:

> [T]he jury instruction here impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted [the victim]... [I]t relieved the State of its burden of proving Hayward recklessly inflicted substantial bodily harm.

Id, at 645.[5]

Here, as in Hayward, the instruction defining "recklessness" conflated the two mental elements into a single element, allowing jurors to convict if they found an intentional assault, regardless of whether or not Mr. Stewart also acted recklessly with respect to the infliction of

[5] Under similar facts, Division I has reached a contrary result, finding that the instructions "made clear" the mental states required for conviction, and "clearly require[d] two separate inquiries..." State v. Holzknecht, 157 Wash. App. 754, 766, 238 P.3d 1233 (2010) review denied, 170 Wash. 2d 1029, 249 P.3d 623 (2011). But Division I made no mention of the "manifestly apparent" standard required under Kyllo.

substantial bodily harm. Id. Accordingly, the conviction must be reversed and the case remanded for a new trial. Id.

D. The error cannot be considered harmless under the heightened standard applicable to mandatory presumptions.

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that the error was "unimportant in relation to everything else the jury considered on the issue in question..." Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), overruled (in part) on other grounds by Estelle v. McGuire, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991); see also State v. Atkins, 156 Wash. App. 799, 813, 236 P.3d 897 (2010) (applying Yates test).

In other words,

> a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone...[I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

Yates, at 403-405 (footnotes and citations omitted). A court must examine the proof actually considered, and ask:

> [W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to

> leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said...that the presumption did not contribute to the verdict rendered.

Yates, at 403-405 (emphasis added). Thus, a reviewing court evaluating harmlessness cannot rely on evidence drawn from the entire record "because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." Yates, at 405-406.[6]

Here, the conclusive presumption required the jury to find Mr. Stewart recklessly inflicted substantial bodily harm upon proof that he acted intentionally (or knowingly). Instruction No. 9, Supp. CP. No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume recklessness from proof of any intentional act, including the intentional assault itself.

The absence of any limitation makes the conclusive presumption here worse than that considered in the cases addressing similar issues.

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[6] In Deal, supra, the court applied the standard test for constitutional harmless error, without reference to Yates. Deal, at 703. Presumably, this was because the defendant in Deal testified and acknowledged the facts that were the subject of the conclusive presumption. Deal, at 703. In Hayward, the Court of Appeals found it unnecessary to analyze harmlessness under Yates, because reversal was required under the standard test for constitutional error. Hayward, at 647 n. 5.

See, e.g., Morissette (intent to steal presumed from the isolated act of taking); Carella v. California, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) ("a person 'shall be presumed to have embezzled' a vehicle if it is not returned within 5 days of the expiration of the rental agreement," and "'intent to commit theft by fraud is presumed' from failure to return rented property within 20 days of demand"); Yates, at 401 ("'malice is implied or presumed' from the 'willful, deliberate, and intentional doing of an unlawful act' and from the 'use of a deadly weapon.'").

The lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Stewart was reckless when he inflicted substantial bodily harm. The analysis is further hindered by the absence of direct evidence establishing the circumstances of the assault. Since the Yates analysis cannot be meaningfully undertaken, the error cannot be harmless beyond a reasonable doubt.

Furthermore, even considering the entire record (contrary to Yates), reversal is required under the traditional test for constitutional error. The evidence was not overwhelming: for example, a reasonable juror could have acquitted Mr. Stewart of the charged crime by deciding that he was criminally negligent rather than reckless in the infliction of substantial bodily harm. Thus, the error was not trivial, formal, or merely

academic. Lorang, at 32. Because of this, Mr. Stewart's conviction for second-degree assault must be reversed and the case remanded for a new trial. Id; Burke, at 222.

E. The plurality decision in Sibert does not compel a contrary result.

The Supreme Court addressed a similar instructional problem in State v. Sibert, 168 Wash. 2d 306, 230 P.3d 142 (2010). The defendant in Sibert was charged with delivery of a controlled substance. The jury was instructed that conviction required proof that the defendant knew the substance delivered was a controlled substance, and that "[a]cting knowingly or with knowledge also is established if a person acts intentionally." Id, at 315. A plurality found the instructions as a whole sufficient under the facts of the case.[7] The court's decision was based in part on the fact that "'there was no second mens rea element to conflate'" with the required proof of knowledge. Id, at 317 n. 7 (quoting State v. Gerdts, 136 Wash.App. 720, 728, 150 P.3d 627 (2007)).

Here, by contrast, Mr. Stewart was charged with an offense expressly requiring proof of two separate mental states: intentional assault and reckless infliction of substantial bodily harm. CP 1-2. The instruction defining recklessness conflated these two mental states by permitting

[7] Justice Madsen concurred in the result only, but did not author a separate opinion.

conviction upon proof of an intentional act. Instruction No. 9, Supp. CP. While those versed in the law would likely arrive at the correct result, jurors lack the interpretive tools available to judges and lawyers. Harris, at 553-554. A reasonable juror could read the court's instructions as a whole and conclude that proof of an intentional assault necessarily satisfied both mens rea elements. The instructions thus cannot be described as "manifestly apparent." Kyllo, at 864. This distinguishes Sibert and Gerdts, since those two cases involved charges with only a single mens rea element.

In addition to this difference, there is another reason why Sibert should not control: "[a] plurality has little precedential value and is not binding." State v. Johnson, 173 Wash. 2d 895, 904, 270 P.3d 591 (2012); see also Lauer v. Pierce County, 173 Wash. 2d 242, 258, 267 P.3d 988 (2011); In re Isadore, 151 Wash. 2d 294, 302, 88 P.3d 390 (2004). Only four justices supported the rationale announced in *Sibert's* lead opinion. Sibert, at 317.

II. MR. STEWART'S ASSAULT CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Constitutional questions are reviewed de novo. E.S., at 702. The interpretation of a statute is reviewed de novo, as is the application of law to a particular set of facts. State v. Engel, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009); In re Detention of Anderson, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Engel, at 576.

B. The prosecution failed to prove the essential elements of second-degree assault.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, at 364. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

A person is guilty of second-degree assault (as charged) if s/he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm..." RCW 9A.36.021; CP 1-2. Here, even taking the evidence in a light most favorable to the prosecution, the evidence was insufficient to prove these elements.

First, nothing in the record establishes what injuries Yanac sustained as a result of the assault. Assuming sufficient evidence to prove an intentional assault and substantial bodily harm, the prosecution failed to introduce evidence showing causation, an essential element of the crime. No one testified about what form the actual assault took, and no medical evidence was presented showing the results of the assault. RP 54-108. Yanac's injuries and lengthy convalescence may have been unrelated to the alleged assault—i.e. because they stemmed from his medical condition, or resulted from an unrelated accident. Accordingly, the evidence was insufficient to show causation—the "thereby" of the statute. RCW 9A.36.021.

Second, the prosecution failed to present evidence establishing recklessness. Even if Mr. Stewart intentionally assaulted Yanac, nothing in the record shows that he knew or should have known about Yanac's medical condition or the risk that he'd suffer more significant harm than the average person. Nor was there evidence showing that Mr. Stewart

repeatedly pummeled or kicked Yanac, or engaged in any other kind of conduct that would likely lead to the kind of harm suffered here. RP 54-108. Absent some proof that he "[knew] of and disregard[ed] a substantial risk" that his actions in particular would cause substantial bodily harm, the evidence was insufficient to establish recklessness. See Instruction No. 9, Supp. CP.

C. The prosecution failed to introduce sufficient independent evidence to establish the corpus delicti of second-degree assault.

An accused person's statements may not be used to prove a criminal offense unless the prosecution establishes the corpus delicti of the charged crime by evidence independent of those statements. State v. Dow, 168 Wash.2d 243, 227 P.3d 1278 (2010); State v. Brockob, 159 Wash.2d 311, 328, 150 P.3d 59 (2006). The rule "requires independent evidence sufficient to establish every element of the crime charged." Dow, at 251. The prosecution must

> present evidence that is independent of the defendant's statement and that corroborates not just a crime but the specific crime with which the defendant has been charged... The State's evidence must support an inference that the crime with which the defendant was charged was committed... [This standard] requires that the evidence support not only the inference that a crime was committed but also the inference that a particular crime was committed.

Brockob, at 329 (emphasis in original). The independent evidence must support each element of the charged crime. Id; Dow, at 254 (noting that

the prosecution must "prove every element of the crime charged by evidence independent of the defendant's statement") (citing Brockob at 328). The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence.[8] Brockob, at 329. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. Id., at 329-330.

Under Brockob, the corpus delicti of second-degree assault requires evidence supporting each element—an intentional assault, causation, recklessness, and substantial bodily harm. Brockob, at 329-330.

Here, the prosecution failed to introduce sufficient independent evidence establishing the corpus delicti. When taken in a light most favorable to the state, the independent evidence proved only that Yanac was "jumped" and suffered substantial bodily harm. RP 104.

As noted above, the evidence as a whole—including Mr. Stewart's statement—was insufficient to prove causation and recklessness. It follows that the independent evidence did not establish these two elements.

[8] In this context, "innocence" refers to innocence of the charged crime, rather than blamelessness. Brockob, supra.

In addition, the prosecution failed to present independent proof of an intentional assault. Apart from Yanac's hearsay statement—that he was "jumped"—there is no independent indication of what happened.[9] RP 54-108. But there was no explanation as to what Yanac meant by the word "jumped." Without some indication that he meant that word to convey an intentional assault, the independent evidence was insufficient to establish that element of the offense. Without such independent evidence, the jury should not have been permitted to consider Mr. Stewart's statements.

The prosecution produced insufficient independent evidence to prove the corpus delicti of second-degree assault. Brockob, supra. Mr. Stewart's conviction must be reversed, his statements suppressed, and the case dismissed with prejudice. Dow, supra.

III. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. STEWART'S RIGHT TO DUE PROCESS AND HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. E.S. at 702. Where prosecutorial misconduct infringes a constitutional right,

[9] Defense counsel was ineffective for failing to object to Yanac's statement, as argued elsewhere in this brief.

prejudice is presumed. Toth, at 615. To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. Lorang, at 32. The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Burke, at 222.

B. The prosecutor committed reversible misconduct by commenting on Mr. Stewart's exercise of his right to remain silent.

An accused person has a constitutional privilege against self-incrimination.[10] U.S. Const. Amend. V; Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It is "well settled" that the prosecution may not comment on or otherwise exploit an accused person's exercise of the privilege. State v. Carnahan, 130 Wash.App. 159, 168, 122 P.3d 187 (2005) (citing Doyle v. Ohio, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); Griffin v. California, 380 U.S. 609, 613-615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

The state may not use pre-arrest silence during its case-in-chief or in its argument as evidence of guilt. State v. Keene, 86 Wash. App. 589,

[10] The Fifth Amendment is applicable to the states through the Fourteenth Amendment's due process clause. U.S. Const. Amend. XIV; Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

593-94, 938 P.2d 839 (1997). An accused person's "right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt." State v. Easter, 130 Wash. 2d 228, 243, 922 P.2d 1285 (1996).

Here, the prosecution twice violated these precepts. First, the prosecutor introduced evidence on direct examination that Mr. Stewart had not returned Detective Keeler's numerous telephone calls. RP 90. Second, the prosecutor highlighted this failure in closing argument. RP 155. By calling the jury's attention to Mr. Stewart's failure to come forward and cooperate in the investigation, the government improperly used his pre-arrest silence to imply guilt. Keene, at 593-594.

This misconduct is presumed prejudicial. Toth, supra. Accordingly, the conviction must be reversed and the case remanded for a new trial. Id.

IV. MR. STEWART WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

C. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wash.2d 853, 865,

16 P.3d 610 (2001); State v. Horton, 136 Wash.App. 29, 146 P.3d 1227 (2006).

D. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when "there is no conceivable legitimate tactic explaining counsel's performance." Reichenbach, at 130. Any trial strategy "must be based on reasoned decision-making..." In re Hubert, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." Kyllo, at 862. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State v. Hendrickson, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

E. If the corpus delicti argument is not preserved for review, Mr. Stewart was denied the effective assistance of counsel.

As noted above, the corpus delicti must be proved by evidence sufficient to establish the charged crime. Brockob, at 329. Where the corpus delicti is not established by independent evidence, failure to object to admission of an accused person's statements constitutes ineffective assistance. State v. C.D.W., 76 Wash.App. 761, 764-765, 887 P.2d 911 (1995). Under such circumstances, "the failure to raise the issue of the

corpus delicti rule... cannot be characterized as a trial strategy;" instead, it is "simply an inexcusable omission on the part of defense counsel." Id., at 764. Furthermore, such deficient performance necessarily prejudices the defendant: in the absence of sufficient independent evidence, the defendant's statements are excluded and the defendant is acquitted. Id., at 764-765.

The independent evidence was insufficient to establish the corpus delicti of robbery. Even when taken in a light most favorable to the state, the independent evidence only established that Mr. Stewart was present when Yanac sustained injury. RP 54-108.

Had defense counsel properly objected to the admission of Mr. Stewart's statements, the state would have been unable to proceed with a charge of assault. Brockob, supra. Counsel's failure to object deprived Mr. Stewart of the effective assistance of counsel. C.D.W., supra. His conviction must be reversed and his case remanded for a new trial. Id.

F. Mr. Stewart was denied the effective assistance of counsel by his attorney's failure to object to inadmissible and prejudicial hearsay.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have

been different had the evidence been excluded. State v. Saunders, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

Here, defense counsel failed to object to hearsay introduced through Deputy Meserve. Meserve was permitted to testify that he'd interviewed Yanac who'd told him that he was "jumped." RP 104. Yanac's out-of-court statement was hearsay, and should have been the subject of an objection. See ER 801, ER 802.

The failure to object constituted ineffective assistance. Saunders, at 578. First, there was no strategic reason to allow the prosecution to introduce this testimony. It bolstered the prosecution's case, and did not help the defense in any way.

Second, an objection would likely have been sustained, as the testimony consisted of inadmissible hearsay that did not fit within an exception to the rule against hearsay. Even if the evidence had been admissible for a limited purpose, counsel should have objected and asked the court to limit the jury's consideration of the testimony. Absent a limiting instruction, the evidence was available for any purpose, including use as substantive evidence of guilt. State v. Myers, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997).

Third, the result of the trial would likely have been different, had counsel objected. The jury had no evidence establishing that Mr. Stewart

intentionally assaulted Yanac (other than Mr. Stewart's own statement, as outlined above). Nor was there evidence indicating which of Yanac's injuries stemmed from the alleged assault and which were simply features of his underlying medical condition. RP 54-108. The inadmissible hearsay strengthened the prosecution's case by suggesting that Yanac had been assaulted, and by implying that his injuries stemmed from the assault.

Defense counsel's performance fell below an objective standard of reasonableness, and prejudiced Mr. Stewart. Accordingly, the assault conviction must be reversed and the charges remanded for a new trial. Reichenbach, at 130.

G. Mr. Stewart was denied the effective assistance of counsel by his attorney's failure to object to testimony and argument that violated his constitutional privilege against self-incrimination.

As noted above, the state may not use pre-arrest silence as evidence of guilt, and is prohibited from introducing evidence of pre-arrest silence during its case-in-chief. Keene, at 593-594. A suspect may decline to assist the state as it investigates and prepares a prosecution. Easter, at 243. Despite this, defense counsel failed to object when the prosecutor introduced evidence that Mr. Stewart had not returned the investigating officer's phone calls. RP 90. There was no strategic purpose

served by allowing this testimony to be introduced during the prosecution's case-in-chief.

Defense counsel also unreasonably failed to object when the prosecutor raised the issue during closing argument. RP 155. A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'" Hodge v. Hurley, 426 F.3d 368, 385 (C.A.6, 2005) (quoting Strickland, at 687-88). Under most circumstances,

> At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

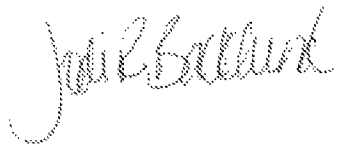
Counsel's failure to object prejudiced Mr. Stewart. The evidence was slight: the prosecution did not present the testimony of anyone who witnessed the alleged assault, or of anyone who related the assault to the injuries suffered by Yanac. RP 54-108. In light of this, there is a reasonable possibility that the error affected the outcome of the proceeding. Reichenbach, at 130. Accordingly, the conviction must be reversed and the case remanded for a new trial. Id.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case dismissed with prejudice. In the alternative, if dismissal is not ordered, the case must be remanded for a new trial.

Respectfully submitted on August 9, 2012,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Bruce Stewart, DOC #721519
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P.O. Box 769
Connell, WA 99326

With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
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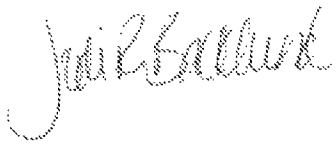
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 9, 2012.



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